SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 44

L. M. DAKIN (SUCCESSOR TO A. M. ANDERSON), AS RECEIVER OF THE FIRST NATIONAL BANK OF ST. PETERSBURG, PETITIONER,

vs.

TAVER BAYLY, AS LIQUIDATOR OF THE PEOPLES BANK OF CLEARWATER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, TAMPA DIVISION

No. 2836

A. M. ANDERSON, as Receiver of the First National Bank of St. Petersburg, a Banking Association Organized and Existing under the Laws of the United States, Plaintiff,

versus

PEOPLES BANK OF CLEARWATER, a Corporation Organized and Existing under the Laws of the State of Florida, Defendant

Tampa. Civil Action. Damages: $3,500.00

DECLARATION—Filed Feb. 1, 1932

Comes now the plaintiff, A. M. Anderson, as Receiver of the First National Bank of St. Petersburg, a banking association organized and existing under the laws of the United States, said plaintiff having been prior to the institution of this suit duly appointed and commissioned Receiver of said First National Bank of St. Petersburg under the provisions of the laws of the United States which authorize the appointment of such a Receiver, and now acting with full authority of law as such Receiver, by his attorney, D. C. McMullen, and sues Peoples Bank of Clearwater, a corporation organized and existing under the laws of the State of Florida, for that heretofore, to-wit, on June 7, 1930, the de-
[fol. 2] fendant was indebted to the First National Bank of St. Petersburg, aforesaid, in the sum of Two Thousand Six Hundred Thirty-one and 30/100 Dollars ($2,631.30) for money before that time lent by said First National Bank of St. Petersburg to the defendant at its request.

And in a like sum of Two Thousand Six Hundred Thirty-one and 30/100 Dollars ($2,631.30) for money before that time paid and expended by said First National Bank of St. Petersburg for the use of the defendant at its request.

And in a like sum of Two Thousand Six Hundred Thirty-one and 30/100 Dollars ($2,631.30) for money before that time received by the defendant for the use of the said First National Bank of St. Petersburg.

And in a like sum of Two Thousand Six Hundred Thirty-one and 30/100 Dollars ($2,631.30) for money found to be due from the defendant to the plaintiff on accounts stated between them. And being so indebted the defendant in consideration thereof then and there promised the said First National Bank of St. Petersburg to pay it the said sum of money on request, together with interest thereon at the rate of eight per cent per annum. Yet, the defendant, though requested, has not paid the same, or any part thereof to the plaintiff, but refuses so to do to the damage of plaintiff in the sum of Three Thousand Five Hundred Dollars ($3,500.00), therefore, he brings suit.

D. C. McMullen, Attorney for Plaintiff.

EXHIBIT TO DECLARATION

Bill of Particulars

Peoples Bank of Clearwater to A. M. Anderson, as Receiver of the First National Bank of St. Petersburg, Dr.

To the sum of $2,540.34 for money collected on, to-wit, June 7, 1930, by defendant for account of First National Bank of St. Petersburg	$2,540.34
[fol. 3] To the sum of $90.96 for money collected on, to-wit, June 7, 1930, by defendant for account of First National Bank of St. Petersburg	90.96
Total	$2,631.30

To interest from, to-wit, June 7, 1930, at the rate of eight per cent per annum on $2,631.30.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S PLEAS—Filed March 23, 1932

Comes now the defendant, Peoples Bank of Clearwater, a corporation organized and existing under the laws of the State of Florida by its undersigned attorneys, and for pleas to the plaintiff's declaration, says:

I. That it was never indebted as alleged.

II. That it never promised to pay the sums of money set forth in plaintiff's declaration as set forth in said declaration.

III. And for a third plea, the defendant says that the First National Bank of St. Petersburg, Florida, was at the commencement of this suit, and still is, indebted to the defendant in an amount equal to the plaintiff's claim for that said First National Bank of St. Petersburg, Florida, was on the 7th day of June, A. D. 1930, indebted to the defendant in the sum of Two Thousand Eight Hundred Ninety-eight and 40/100 ($2,898.40) Dollars, for money before that time lent by this defendant to the said First National Bank of St. Petersburg at its request.

[fol. 4] And in a like sum of Two Thousand Eight Hundred Ninety-eight and 40/100 ($2,898.40) Dollars, for money before that time paid and expended by the Peoples Bank of Clearwater for the use and benefit of the First National Bank of St. Petersburg, at its request.

And in a like sum of Two Thousand Eight Hundred Ninety-eight and 40/100 ($2,898.40) Dollars, for money before that time received by the First National Bank of St. Petersburg for the use of the Peoples Bank of Clearwater.

And in a like sum of Two Thousand Eight Hundred Ninety-eight and 40/100 ($2,898.40) Dollars, for money found to be due from the First National Bank of St. Petersburg to the Peoples Bank of Clearwater on accounts stated between them; which amount of Two Thousand Eight Hundred Ninety-eight and 40/100 ($2,898.40) Dollars the defendant is willing to set off against the plaintiff's claim.

Defendant's exhibits marked Exhibits "A," "B," "C" and "D" are hereto attached in lieu of a bill of particulars.

IV. And for fourth plea, defendant says that the First National Bank of St. Petersburg, Florida, was at the commencement of this suit and still is indebted to this defendant in the amount of Three Hundred Forty-five and 69/100 ($345.69), for

That for value received the said First National Bank of St. Petersburg, Florida, made and executed by its Cashier one certain check or draft numbered 123615, dated June 4, 1930, drawn on the Chase National Bank of New York, a photostatic copy of which check or draft is hereto attached

[fol. 5] and made a part hereof and marked Defendant's Exhibit "A", payable to the order of Peoples Bank of Clearwater, which check or draft was duly indorsed and promptly presented for payment, but payment on same was dishonored and refused. Wherefore this defendant is willing to set off the said sum of Three Hundred Forty-five and 69/100 ($345.69) Dollars against the plaintiff's claim.

V. And for fifth plea, defendant says that the First National Bank of St. Petersburg, Florida, was at the commencement of this suit and still is indebted to this defendant in the amount of One Thousand Five Hundred Twelve and 62/100 ($1,512.62) Dollars, for

That for value received the said First National Bank of St. Petersburg, Florida, made and executed by its Cashier one certain check or draft numbered 123640, dated June 5, 1930, drawn on the Chase National Bank of New York, a photostatic copy of which check or draft is hereto attached and made a part hereof and marked Defendant's Exhibit "B", payable to the order of Peoples Bank of Clearwater, which check or draft was duly indorsed and presented for payment, but payment on same was dishonored and refused. Wherefore this defendant is willing to set off the said sum of One Thousand Five Hundred Twelve and 62/100 ($1,512.62) Dollars against the plaintiff's claim.

VI. And for sixth plea, defendant says that the First National Bank of St. Petersburg, Florida, was at the commencement of this suit and still is indebted to this defendant in the amount of Three *Dollars* Thirty-two and 21/100 ($332.21) Dollars, for

That for value received the said First National Bank of St. Petersburg, Florida, made and executed by its Cashier [fol. 6] one certain check or draft numbered 123656, dated June 6, 1930, drawn on the Chase National Bank of New York, a photostatic copy of which check or draft is hereto attached and made a part hereof and marked Defendant's Exhibit "C", payable to the order of Peoples Bank of Clearwater, which check or draft was duly indorsed and promptly presented for payment, but payment on same was dishonored and refused. Wherefore this defendant is willing to set off the said sum of Three Hundred Thirty-two and 21/100 ($332.21) Dollars against the plaintiff's claim.

VII. And for seventh plea, defendant says that the First National Bank of St. Petersburg, Florida, was at the commencement of this suit and still is indebted to this defendant in the amount of Seven Hundred Seven and 88/100 ($707.88) Dollars, for

That for value received the said First National Bank of St. Petersburg, Florida, made and executed by its Cashier one certain check or draft numbered 123672, dated June 7, 1930, drawn on the Chase National Bank of New York, a photostatic copy of which check or draft is hereto attached and made a part hereof and marked Defendant's Exhibit "D", payable to the order of Peoples Bank of Clearwater, which check or draft was not paid because on the date said check or draft was received by this defendant the First National Bank of St. Petersburg closed its doors and ceased operating as a banking institution, and therefore, the presentation of said check or draft to the said Chase National Bank of New York would have been futile. Wherefore this defendant is willing to set off the said sum of Seven Hundred Seven and 88/100 ($707.88) Dollars against the plaintiff's claim.

McMullen, McMullen & Pogue, by Cyril E. Pogue,
Attorneys for Defendant.

[fol. 7] *Duly sworn to by E. H. Ashcraft. Jurat omitted in printing.*

DEFENDANT'S EXHIBIT "A" TO PLEAS

First National Bank of St. Petersburg

63-74

No. 123,615. St. Petersburg, Fla., Jun. 4, 1930.

Pay to the order of Peoples Bank, Clearwater, $345.69, $345 and 69 cents.

C. H. Cox, Assistant Cashier.

To Chase National Bank, New York.

1-74.
Registered.
894.

Indorsed on the back thereof: Pay to the order of Any [fol. 8] National Bank, State Bank, Bank of Trust Com-

pany. Prior indorsements guaranteed. Jun. 5, 1930. Peoples Bank of Clearwater, Clearwater, Fla. 63-209. 63209. Taver Bayly, Cashier.

DEFENDANT'S EXHIBIT "B" TO PLEAS

First National Bank of St. Petersburg

63-74

No. 123,640. St. Petersburg, Fla., Jun. 5, 1930.

Pay to the order of Peoples Bank, Clearwater, $1,512.62, 1,512 and 62 cents.

C. H. Cook, Assistant Cashier.

To Chase National Bank, New York.

1-74.
Registered.
894.

Indorsed on the back thereof: Pay to the order of Any National Bank, State Bank. Bank *of* Trust Company. Prior indorsements guaranteed. Jun. 6, 1930. Peoples Bank of Clearwater, Clearwater, Fla. 63209 63209. Taver Bayly, Cashier.

[fol. 9] DEFENDANT'S EXHIBIT "C" TO PLEAS

First National Bank of St. Petersburg

63-74

No. 123,6656. St. Petersburg, Fla., Jun. 6, 1930.

Pay to the order of Peoples Bank, Clearwater, $332.21, 332 and 21 cts.

C. H. Cox, Assistant Cashier.

To Chase National Bank, New York.

1-74.
Registered.
894.

Indorsed on the back thereof: Pay to the order of Any National Bank, State Bank, Bank *of* Trust Company. Prior

indorsements guaranteed. Jun. 7, 1930. Peoples Bank of Clearwater, Clearwater, Fla. 63209. 63209. Taver Bayly, Cashier.

DEFENDANT'S EXHIBIT "D" TO PLEAS

First National Bank of St. Petersburg

63-74

No. 123,672. St. Petersburg, Fla., Jun. 7, 1930.

Pay to the order of Peoples Bank, Clearwater, $707.88, 707 and 88 cts.

C. H. Cox, Assistant Cashier.

To Chase National Bank, New York.

1-74.
Registered.
894.

[fol. 10] IN UNITED STATES DISTRICT COURT

REPLICATION—Filed March 24, 1932

Now comes the plaintiff, aforesaid, and joins issue on defendant's first plea.

And for replication to defendant's fourth plea plaintiff says, that the check or draft mentioned in said plea was drawn by the First National Bank of St. Petersburg, Florida in remittance for checks or drafts drawn on the First National Bank of St. Petersburg, Florida, on the Central National Bank of St. Petersburg, Florida, and on First Securities Bank, of St. Petersburg, Florida, and deposited with the defendant, Peoples Bank of Clearwater, for collection which last mentioned checks or drafts were forwarded by defendant to the First National Bank of St. Petersburg, Florida, that upon receipt of such checks or drafts by the First National Bank of St. Petersburg, Florida, it charged against the accounts of the drawers all checks or drafts drawn upon it and all checks or drafts drawn on Central National Bank of St. Petersburg, Florida, it exchanged or

cleared with Central National Bank of St. Petersburg, Florida, for checks or drafts held by Central National Bank of St. Petersburg, Florida, and drawn on First National Bank of St. Petersburg, Florida, the balance on the date of such clearance being in favor of the Central National Bank of St. Petersburg, Florida, which balance was liquidated by First National Bank of St. Petersburg, Florida, paying the difference to the Central National Bank of St. Petersburg, Florida; and First National Bank of St. Petersburg, Florida, charged against First Securities Bank, of St. Petersburg, Florida, all checks or drafts drawn upon said First Securities Bank, and that said check or draft men-
[fol. 11] tioned in defendant's said fourth plea is, therefore, without consideration and void. Payment of same not having been made because of the failure of First National Bank of St. Petersburg, before said check or draft was presented to Chase National Bank for payment.

And for replication to defendant's fifth plea plaintiff says, that the check or draft mentioned in said plea was drawn by the First National Bank of St. Petersburg, Florida, in remittance for checks or drafts drawn on the First National Bank of St. Petersburg, Florida, and on Central National Bank of St. Petersburg, Florida, and deposited with the defendant, Peoples Bank of Clearwater, for collection which last mentioned checks or drafts were forwarded by defendant to the First National Bank of St. Petersburg, Florida, that upon receipt of such checks or drafts by the First National Bank of St. Petersburg, Florida, it charged against the accounts of the drawers all checks or drafts drawn upon it and all checks or drafts drawn on Central National Bank of St. Petersburg, Florida, it exchanged or cleared with Central National Bank of St. Petersburg, Florida, for checks or drafts held by Central National Bank of St. Petersburg, Florida, and drawn on First National Bank of St. Petersburg, Florida, the balance on the date of such clearance being in favor of the Central National Bank of St. Petersburg, Florida, which balance was liquidated by First National Bank of St. Petersburg, Florida, paying the difference to the Central National Bank of St. Petersburg, Florida, and that said check or draft mentioned in defendant's said fifth plea is therefore, without consideration and void. Payment of same not having been made because of the failure of First National Bank of

St. Petersburg before said check or draft was presented to Chase National Bank for payment.

[fol. 12] And for replication to defendant's sixth plea plaintiff says, that the check or draft mentioned in said plea was drawn by the First National Bank of St. Petersburg, Florida, in remittance for checks or drafts drawn on the First National Bank of St. Petersburg, Florida, and on Central National Bank of St. Petersburg, Florida, and deposited with the defendant, Peoples Bank of Clearwater, for collection which last mentioned checks or drafts were forwarded by defendant to the First National Bank of St. Petersburg, Florida, that upon receipt of such checks or drafts by the First National Bank of St. Petersburg, Florida, it charged against the accounts of the drawers all checks or drafts drawn upon it and all checks or drafts drawn on Central National Bank of St. Petersburg, Florida, it exchanged or cleared with Central National Bank of St. Petersburg, Florida, for checks or drafts held by Central National Bank of St. Petersburg, Florida, and drawn on First National Bank of St. Petersburg, Florida, the balance on the date of such clearance being in favor of the Central National Bank of St. Petersburg, Florida, which balance was liquidated by First National Bank of St. Petersburg, Florida, paying the difference to the Central National Bank of St. Petersburg, Florida, and that said check or draft mentioned in defendant's said sixth plea is, therefore, without consideration and void. Payment of same not having been made because of the failure of First National Bank of St. Petersburg before said check or draft was presented to Chase National Bank for payment.

And for replication to defendant's seventh plea plaintiff says, that the check or draft mentioned in said plea was drawn by the First National Bank of St. Petersburg, Florida, in remittance for checks or drafts drawn on the First National Bank of St. Petersburg, Florida, and on Central National Bank of St. Petersburg, Florida, and deposited with the defendant, Peoples Bank of Clearwater, for collec-
[fol. 13] tion which last mentioned checks or drafts were forwarded by defendant to the First National Bank of St. Petersburg, Florida, that upon receipt of such checks or drafts by the First National Bank of St. Petersburg, Florida, it charged against the accounts of the drawers all checks or drafts drawn upon it and all checks or drafts

drawn on Central National Bank of St. Petersburg, Florida, it exchanged or cleared with Central National Bank of St. Petersburg, Florida, for checks or drafts held by Central National Bank of St. Petersburg, Florida, and drawn on First National Bank of St. Petersburg, Florida, the balance on the date of such clearance being in favor of the First National Bank of St. Petersburg, Florida, which balance was liquidated by Central National Bank of St. Petersburg, Florida, paying the difference to the First National Bank of St. Petersburg, Florida, by means of a draft on the Chase National Bank of New York, and said check or draft mentioned in said seventh plea is, therefore, without consideration and void.

D. C. McMullen, Attorney for Plaintiff.

Duly sworn to by D. C. McMullen. Jurat omitted in printing.

[fol. 14] IN UNITED STATES DISTRICT COURT

DEMURRER TO REPLICATIONS—Filed March 28, 1932

Comes now the defendant, Peoples Bank of Clearwater, and says that the first, second, third and fourth replications of the plaintiff herein are each separately insufficient, and this defendant therefore demurs to same separately, and for substantial matters of law intended to be argued, assigns the following:

1st. The matters and things set forth in said replications and each of them set forth no defense to the pleas and each of them of this defendant.

2nd. Said replications and each of them are an attempt to vary a valid written instrument complete on its face by parole testimony.

3rd. The facts set forth in said replications and each of them affirmatively show that this defendant has the legal right to sue on and collect the drafts set forth and described in the pleas of this defendant.

4th. The replications and each of them affirmatively show that the drafts set forth and made a part of this defend-

ant's pleas were executed and delivered to this defendant for a valuable consideration moving from this defendant to the First National Bank of St. Petersburg.

5th. Said replications and each of them attempt to defend against the pleas of this defendant by way of confession and avoidance, and said replications confess and utterly fail as a matter of law to avoid.

6th. Said replications and each of them fail to set forth sufficient facts to warrant the conclusion that the drafts [fol. 15] attached to and made a part of the defendant's pleas are without consideration and void.

McMullen, McMullen & Pogue, by Cyril E. Pogue,
Attorneys for Defendant.

I hereby certify that in my opinion the above and foregoing demurrers are well founded in point of law.

Cyril E. Pogue, of Counsel for the Defendant.

Duly sworn to by Cyril E. Pogue. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING DEMURRER—July 29, 1932

This cause having come on to be heard upon the motion of plaintiff to strike defendant's second plea, the motion of plaintiff to require defendant to file a more specific bill of [fol. 16] particulars in support of its third plea, and the demurrer of defendant to plaintiff's replications to defendant's fourth, fifth, sixth and seventh pleas, and the same having been argued by counsel, and the Court being fully advised in the premises, upon consideration thereof, it is Ordered and Adjudged as follows:

1st. That the motion to strike defendant's second plea be and the same is hereby granted.

2nd. That the motion to require defendant to file a more specific bill of particulars in support of its third plea be and the same is hereby granted and defendant is allowed five days from the date hereof in which to file a more specific bill of particulars.

3rd. That defendant's demurrer to plaintiff's replications to defendant's fourth, fifth, sixth and seventh pleas be and the same is hereby sustained to each and every of said pleas.

4th. That plaintiff be and he is hereby allowed ten days from the date hereof in which to file further replication, or replications, to defendant's pleas as he is advised, and to which replication, or replications, if filed, defendant shall demur or rejoin within ten days therefrom.

Done and ordered at Tampa, Florida, this the 29th day of July, 1932.

Alexander Akerman, United States District Judge.

[fol. 17] IN UNITED STATES DISTRICT COURT

REPLICATION—Filed Aug. 1, 1932

Now comes the plaintiff, A. M. Anderson, as Receiver of the First National Bank of St. Petersburg, and leave first being had by order of the Court, files this his replication to defendant's third, fourth, fifth, sixth and seventh pleas, and says that plaintiff's cause of action herein is for money collected on, to-wit, June 7, 1930, by defendant as agent for the First National Bank of St. Petersburg, as appears by the bill of particulars attached to plaintiff's declaration, and neither First National Bank of St. Petersburg, nor plaintiff has ever consented that defendant might set off the same against any alleged indebtedness due by plaintiff to defendant.

D. C. McMullen, Attorney for Plaintiff.

Duly sworn to by D. C. McMullen. Jurat omitted in printing.

[fol. 18] IN UNITED STATES DISTRICT COURT

DEMURRER TO REPLICATION—Filed Aug. 9, 1932

Comes now Peoples Bank of Clearwater, a corporation organized and existing under the laws of the State of Florida, by its undersigned attorneys, and says that the

replication of the plaintiff heretofore filed herein to the defendant's pleas number III, IV, V, VI, and VII, is bad in substance.

Wherefore this defendant demurs to the same and for substantial matters of law intended to be argued assigns the following:

1st. Sufficient facts are not set up to constitute a legal defense to the pleas replied to.

2nd. There are no facts set forth in said replication which as a matter of law would change the substantial rights of this defendant.

3rd. The replication is a departure in pleading.

4th. The plaintiff by said replication is attempting to recover on a cause of action different from the cause of action sued on in its declaration.

5th. It affirmatively appears by the record in this cause that this Court has already adjudicated the sufficiency of the facts set forth in the replication.

McMullen, McMullen & Pogue, by Cyril E. Pogue,
Attorneys for the Defendant.

[fol. 19] I, Cyril E. Pogue, of counsel for the defendant in the above and foregoing cause, hereby certify that in my opinion the above and foregoing demurrer is well founded in point of law.

Cyril E. Pogue.

Duly sworn to by Cyril E. Pogue. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

REPLICATIONS TO THIRD PLEA—Filed Sept. 23, 1932

Now comes the plaintiff, aforesaid, and for replications to defendant's third plea and each and every count thereof says:

First. That the First National Bank of St. Petersburg never was indebted as alleged.

[fol. 20] Second. That the claims set forth in each count of said plea are not separate and distinct, but are one and

the same as set forth in defendant's fourth, fifth, sixth and seventh pleas and arose in the following manner, to-wit:

Certain checks or drafts were deposited in the usual course of business with Peoples Bank of Clearwater by its customers, which checks or drafts were drawn on the First National Bank of St. Petersburg, Central National Bank of St. Petersburg and First Securities Bank of St. Petersburg and sent for collection and remittance by Peoples Bank of Clearwater to First National Bank of St. Petersburg. These checks or drafts were collected by First National Bank of St. Petersburg charging such as were drawn on it against the accounts of the various customers by whom they were drawn. The checks or drafts drawn on Central National Bank it exchanged or cleared with Central National Bank for checks or drafts held by Central National Bank and drawn on First National Bank of St. Petersburg, the balances on June 4th, 5th and 6th, 1930 being in favor of Central National Bank, which were paid by First National Bank of St. Petersburg, and the balance on June 7th, 1930 being in favor of First National Bank of St. Petersburg, which was paid by Central National Bank. The checks or drafts drawn on First Securities Bank were charged by First National Bank of St. Petersburg to First Securities Bank, the latter having an account with the First National Bank of St. Petersburg. There were four of these cash letters and remittances therefor were attempted to be made by First National Bank of St. Petersburg to Peoples Bank of Clearwater by separate drafts on Chase National Bank of New York as follows: One for Three Hundred Forty-five and 96/100 Dollars ($345.96), one for One Thousand Five Hundred Twelve and 62/100 Dollars ($1,512.62), one for Three Hundred Thirty-two and 21/100 Dollars ($332.21), [fol. 21] and one for Seven Hundred Seven and 88/100 Dollars ($707.88), copies of these drafts being defendant's Exhibits A, B, C and D, respectively. None of these drafts were paid because First National Bank of St. Petersburg closed on June 9, 1930, before they were presented to Chase National Bank of New York for payment. The total amount of these drafts was Two Thousand Eight Hundred Ninety-eight and 40/100 Dollars ($2,898.40) and Peoples Bank of Clearwater carried no account or deposit with First National Bank of St. Petersburg, nor did First National Bank of St. Petersburg carry any account or deposit with

Peoples Bank of Clearwater, although for a long period of time each bank had been sending checks and drafts to the other for collection and remittance. Wherefore, plaintiff alleges that there is no mutuality in the debts or demands existing between the plaintiff and the defendant at the commencement of this action and defendant is not entitled to the set-off sought in its said plea.

D. C. McMullen, Attorney for Plaintiff.

Duly sworn to by D. C. McMullen. Jurat omitted in printing.

[fol. 22] IN UNITED STATES DISTRICT COURT

DEMURRER TO REPLICATIONS—Filed Sept. 23, 1932

Comes now the defendant in the above cause, by his undersigned attorneys, and for demurrer to the second replication contained in plaintiff's replications to defendant's third plea, says that said replication is bad in substance, and for substantial matters of law intended to be argued, assigns the following grounds:

1st. The matters and things set forth in said replication set forth no defense to the third plea of said defendant.

2nd. The facts set forth in said replication affirmatively show that this defendant has the legal right to sue on and collect the drafts set forth and described in the third plea of said defendant.

3rd. The replication affirmatively shows that the drafts set forth and made a part of this defendant's pleas, and referred to in plaintiff's replication, were executed and delivered to this defendant for a valuable consideration moving from this defendant to the First National Bank of St. Petersburg.

4th. Said replication attempts to defend against the third plea of this defendant by way of confession and avoidance, and said replication confesses and utterly fails as a matter of law to avoid.

5th. That the matters and things set forth in the plaintiff's replication show affirmatively that the defendant has the legal right to set-off against the plaintiff.

[fol. 23] 6th. It affirmatively appears by the record in this cause that this Court has already adjudicated the sufficiency of the facts set forth in the replication.

McMullen, McMullen & Pogue, by Cyril E. Pogue, Attorneys for Defendant.

I hereby certify that in my opinion the above and foregoing demurrer is well founded in point of law.

Cyril E. Pogue, of Counsel for the Defendant.

Duly sworn to by Cyril E. Pogue. Jurat ommitted in printing.

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING DEMURRERS—Sept. 23, 1932

This cause having come on to be heard upon defendant's demurrer to plaintiff's second replication to defendant's [fol. 24] third plea, and defendant's demurrer to plaintiff's replication to defendant's third, fourth, fifth, sixth and seventh pleas, and the same having been considered by the Court,

It is ordered and adjudged that said demurrers be and they are hereby sustained, and plaintiff having declined to plead further, it is ordered and adjudged that defendant take judgment on its plea of set-off for the balance above plaintiff's claim.

Done and ordered at Tampa, Florida, this the 23rd day of September, 1932.

Alexander Akerman, United States District Judge.

IN UNITED STATES DISTRICT COURT

JUDGMENT—Sept. 23, 1932

This cause having come on to be heard upon motion of attorneys for defendant for judgment on pleas of set-off filed herein, and it appearing that the demurrers filed by defendant to the replications filed by plaintiff have been sustained, and plaintiff declining to plead further, and the Court being fully advised in the premises,

It is considered, ordered and adjudge-, that the set-off alleged in defendant's pleas be and it is hereby allowed; and that the defendant, Taver Bayly, as Liquidator of Peoples Bank of Clearwater, do have and recover of and from A. M. Anderson, as Receiver of the First National Bank of St. Petersburg, the sum of Two Hundred Sixty-seven and 10/100 Dollars ($267.10), together with the sum of Five Dollars ($5.00) costs in this behalf expended.
[fol. 25]. Done and ordered at Tampa, Florida, this the 23rd day of September, 1932.

Alexander Akerman, United States District Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Sept. 30, 1932

A. M. Anderson, as Receiver of the First National Bank of St. Petersburg, Florida, plaintiff, conceiving himself aggrieved by the final judgment made and entered on the 23rd day of September, 1932, in the above entitled cause, does hereby appeal from said final judgment by direction of the Comptroller of the Currency of the United States to the United States Circuit Court of Appeals for the Fifth Circuit for the reasons specified in the assignments of error, which are filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said final judgment was entered, duly authenticated, may be sent to the United States Circuit Court of Appeals of the Fifth Circuit in accordance with the statutes and rules of Court in such cases provided.

D. C. McMullen, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Sept. 30, 1932

On motion of D. C. McMullen, counsel for plaintiff, it is hereby ordered, that an appeal to the Circuit Court of Appeals of the Fifth Circuit from the final judgment here-
[fol. 26] tofore entered herein be and the same is hereby allowed, and that a certified transcript of the record

and all proceedings be forthwith transmitted to said Circuit Court of Appeals.

It is further ordered, that this appeal being taken by direction of the Comptroller of the Currency of the United States no bond shall be required.

Done and ordered at Tampa, Florida, this the — day of September, 1932.

Alexander Akerman, United States District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Sept. 30, 1932

Now comes A. M. Anderson, as Receiver of the First National Bank of St. Peterburg, Florida, plaintiff in the above entitled cause and assigns the following errors:

1st. That the Court erred in entering the order dated July 29, 1932, sustaining defendant's demurrer to plaintiff's replications to defendant's fourth, fifth, sixth and seventh pleas.

2nd. That the Court erred in entering the order dated September 23, 1932, sustaining defendant's demurrer to plaintiff's second replication to defendant's third plea and defendant's demurrer to plaintiff's separate replication to defendant's third, fourth, fifth, sixth and seventh pleas.

[fol. 27] 3rd. That the Court erred in entering final judgment on September 23, 1932.

Wherefore the said plaintiff prays that the final judgment of the District Court of the United States in and for the Southern District of Florida, in this cause entered, be reversed.

D. C. McMullen, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Sept. 30, 1932

To the clerk of the aforesaid court:

You are requested to make transcript of record to be filed in the United States Circuit Court of Appeals for the

Fifth Circuit pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other, papers:

1. Plaintiff's declaration.
2. Defendant's pleas filed March 23, 1932.
3. Plaintiff's replication to defendant's 4th, 5th, 6th and 7th pleas filed March 24, 1932.
4. Defendant's demurrer to plaintiff's replication filed March 28, 1932.
5. Order sustaining demurrer to plaintiff's replications made and entered July 29, 1932.
6. Plaintiff's replication to defendant's 3rd, 4th, 5th, 6th and 7th pleas filed August 1, 1932.

[fol. 28] 7. Defendant's demurrer to plaintiff's replication filed August 9, 1932.

8. Plaintiff's additional replications to defendant's 3rd plea, filed September 23, 1932.
9. Defendant's demurrer to plaintiff's second replication to defendant's 3rd plea, filed September 23, 1932.
10. Order sustaining demurrer to plaintiff's second replication to defendant's 3rd plea and sustaining defendant's demurrer to plaintiff's replication to defendant's 3rd, 4th, 5th, 6th and 7th pleas, made and entered September 23, 1932.
11. Final judgment.
12. Petition for appeal.
13. Order allowing appeal.
14. Assignments of error.
15. Citation.
16. These directions to the clerk.
17. Acceptance of service of citation and copy of directions to clerk.

D. C. McMullen, Attorney for Plaintiff.

[fol. 29] Clerk's certificate to foregoing transcript omitted in printing.

MEMORANDUM RE CITATION

Original Citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

* * * * * * *

[fol. 30] Minute entry of argument and submi. n, February 20, 1933, omitted in printing.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 6786

A. M. ANDERSON, as Receiver of the First National Bank of St. Petersburg, Appellant,

versus

TAVER BAYLY, as Liquidator of the Peoples Bank of Clearwater, Appellee

Appeal from the District Court of the United States for the Southern District of Florida

(March 4, 1933)

Before Bryan, Foster, and Hutcheson, Circuit Judges

OPINION OF THE COURT—Filed March 4, 1933

BRYAN, Circuit Judge:

On June 7, 1930, the Peoples Bank of Clearwater, Florida, had collected $2540.34 for the First National Bank of St. Petersburg, Florida; and the St. Petersburg bank had col-
[fol. 32] lected $2898.40 for the Clearwater bank, the money collected by each bank being represented by checks of its customers that had been forwarded to it by the other for collection and remittance. Both banks were acting in the usual course of business as mutual correspondents; neither was a depositor of the other. In an attempted settlement of the amount it had collected, the St. Petersburg bank sent its drafts on a New York bank to the Clearwater bank; but, because of its failure on June 9, the drafts were not paid. In an action against it by appellant as receiver of the St. Petersburg bank to recover the amount due that bank, the Clearwater bank pleaded as a set-off the larger amount due it, and, having itself failed pending suit, appellee as its liquidator recovered judgment for the excess.

Appellant takes the position that it was error to allow a set-off, because, as he says, (1) the Clearwater bank did not have title to the checks which it forwarded to the St. Petersburg bank for collection, since until final payment the depositor of each such check remained the owner of it; and (2) the Clearwater bank held the amount which it had collected for the St. Petersburg bank as the latter's agent. Compiled General Laws of Florida, §4326, provides:

"All debts or demands mutually existing between the parties at the commencement of the action, whether the same be liquidated or not, shall be proper subjects to set-off, and may be pleaded accordingly. * * * in case the jury shall find a balance for the defendant, such defendant may claim a judgment for the same, and take out execution accordingly."

The right of set-off, while it did not exist at common law, was provided for by statute of 2 Geo. II, ch. 24, s. 4, which enacted that where there are mutual debts between the plaintiff and defendant one debt may be set off against the other in order to avoid circuity of action and injustice. United States v. Eckford, 6 Wall. 484; Rolling Mill Co. v. St. Louis Ore & Steel Co., 152 U. S. 596, 615. Independent [fol. 33] debts of the parties may be set off against each other by way of mutual deduction, and so a claim founded on debt may be used by the defendant though it does not arise out of the transaction sued on, provided it tends to defeat or diminish the plaintiff's right to recovery. Scammon v. Kimball, 92 U. S. 363; 24 R. C. L. 851. In Florida, as has already been shown, the defendant may have judgment if the balance be in his favor. The Florida Negotiable Instruments Law provides that "the holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument." §6810, C. G. L. It was of no concern to the appellant whether the Clearwater bank held the check for its depositors for collection or for value. McCallum v. Driggs, 35 Fla. 277; Brown v. First National Bank, 86 Fla. 198. Since the Clearwater bank had the right to maintain a suit in its own name for the amount due it by the appellant; it had the right of set-off in a suit against it by appellant for the amount of its indebtedness to the St. Petersburg bank. Farmers Bank v. Penn Bank, 123 Pa. 283; Clarke v. National Bank, —

Mont. —, 252 Pac. 373. The right of set-off under the facts of this case exists notwithstanding the provision in §6834 of the Negotiable Instruments Law to the effect that when a bank receives for collection a check or other negotiable instrument which it forwards to another bank for collection, it shall only be liable after actual final payment is received by it. The last named section deals with the question of due diligence as between a bank on the one hand and its depositors on the other. It does not affect the right of the bank to recover from another bank the amount collected for the former by the latter.

In this case all the checks sent by each bank to the other had been paid in full, and as a result the drawers of the checks had been discharged. It was no longer possible for either bank to return to its depositors the checks which it [fol. 34] had received from them. Each bank was debtor in the same capacity that it was creditor. One was no more an agent than the other. If the Clearwater bank did not have a right to sue, neither did appellant. In our opinion either bank had the right to sue or to plead set-off if sued, because mutual debts were due to and from them in the same capacity. 24 R. C. L. 858.

The judgment is affirmed.

[fol. 35] In United States Circuit Court of Appeals

No. 6786

A. M. Anderson, as Receiver of the First National Bank of St. Petersburg,

versus

Taver Bayly, as Liquidator of the Peoples Bank of Clearwater

Judgment—March 4, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said Dis-

trict Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, A. M. Anderson, as Receiver of the First National Bank of St. Petersburg, be condemned to pay the costs of this cause in this Court.

[fol. 36] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,627. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 44. L. M. Dakin (successor to A. M. Anderson), as receiver of the First National Bank of St. Petersburg, petitioner, vs. Taver Bayly, as liquidator of the Peoples Bank of Clearwater. Petition for a writ of certiorari and exhibit thereto. Filed May 4, 1933. No. 44, O. T. 1933.